United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

141

ELLEN DONOHO MITCHELL,	:	
Appellant,	:	
v.	:	Nos. 20916 20993
CYNTHIA D. ENSOR, ET AL	:	
Appellees	:	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

April 15, 1968

ELLEN DONOHO MITCHELL

BY _____
WILLIAM G. MITCHELL
1115 N. Calvert Street
Baltimore, Maryland 21202
ATTORNEY IN FACT
(By General Power of Attorney for
this Case)

STATEMENT OF QUESTIONS PRESENTED

I. The primary question is whether the District Court has jurisdiction to entertain a civil petition and adjudicate relative to the appointment of temporary and permanent conservators of the estate or person of someone committed in pre-trial proceedings to a public hospital as not competent to stand trial "by order of the Court in a criminal proceeding?"

II. Also may a petition that is also substantially erroneous factually and is therefore misleading be used as a jurisdictional basis for the appointment of temporary and permanent conservators of the estate or person of someone committed in pre-trial proceedings to a public hospital as not competent to stand trial "by order of the Court in a criminal proceeding?"

III. Also did the U.S. District Court For The District of Columbia comply with the Federal Constitutional requirements of due process of law for appellant by assuming jurisdiction and adjudicating relative to the appointment of temporary and permanent conservators of the estate and person of the appellant?

IV. Is such a case an appropriate case for the award of costs, including attorneys' fees to the appellant under the lawful and equitable powers of the federal Courts?

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STATUTES AND RULES INVOLVED

I.

Section 21-501, D.C. (1961) Code, as amended by Section 21-1501 and Section 21-501 of the D.C. Code, Supp. V (1966).

Section 21-1501 follows:

Section 21-1501. Appointment of Conservators.

When an adult residing in or having property in the District of Columbia is unable, by reason of advanced age, mental weakness not amounting to unsoundness of mind, mental illness, as the latter term is defined by section 21-501, or physical incapacity, properly to care for his property, the United States District Court for the District of Columbia may, upon his petition or the sworn petition of one or more of his relatives or any other person or persons, appoint a fit person to be conservator of his property. (Sept. 14, 1965, 79 Stat. 774, Pub. L. 89-183, Sec. 1, eff. Jan. 1, 1966.)

Revision Notes

Based on D.C. Code, 1961 ed., Sec. 21-501 (Oct. 24, 1951, ch. 545, Sec. 1, 65 Stat. 608; Sept. 15, 1964, Pub. L. 88-597, Sec. 18, 78 Stat. 953).

Changes are made is phraseology.

Section 21-501, D.C. 1961 Code, Supp. V (1966), which in relevant part thereof follows:

Section 21-501. Definitions.

As used in the chapter:

"administrator" means a person in charge of a public or private hospital or his delegate;

"chief of service" means the physician charged with overall responsibility for the professional program of care and treatment in the particular administrative unit of the hospital to which the patient has been admitted or such other member of the medical staff as the chief of service designates;

"Commission" means the Commission on Mental Health;

"Court" means the United States District Court for the District of Columbia;

"mental illness" means a psychosis or other disease which substantially impairs the mental health of a person;

"mentally ill person" means a person who has a mental illness, but does not include a person committed to a private or public hospital in the District of Columbia by order of the court in a criminal proceeding;

Section 21-501. Definitions. (Cont'd)

"physician" means a person licensed under the laws of the District of Columbia to practice medicine, or a person who practices medicine in the employment of the Government of the United States or of the District of Columbia;

"private hospital" means a nongovernmental hospital or institution, or part thereof, in the District of Columbia, equipped and qualified to provide inpatient care and treatment for a person suffering from a physical or mental illness; and

"public hospital" means a hospital or institution, or part thereof, in the District of Columbia, owned and operated by the Government of the United States or of the District of Columbia, equipped and qualified to provide inpatient care and treatment for persons suffering from physical or mental illness. (Sept. 14, 1965, 79 Stat. 751, Pub. L. 89-183, Sec. 1, eff. Jan. 1, 1966.)

Revision Notes

Based on D.C. Code 1961 ed. Sec. 21-351 (Sept. 15, 1964, Pub. L. 88-597, Sec. 2, 78 Stat. 944).

Definitions of "Commission" and "Court" are inserted (see section 21-502 and other sections of this chapter), and minor changes are made in arrangement and phraseology.

Federal Rule of Civil Procedure No. 12(h)(2).

(h) Waiver or Preservation of Certain Defenses.
(2) Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action. As amended Dec. 27, 1946, eff. March 19, 1948, Feb. 28, 1966, eff. July 1, 1966.

Federal Rule of Civil Procedure No. 8(f).

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Fifth Amendment of The Constitution of The United States of America.

It should be mentioned that Section 21-501, D.C. (1961) Code, as amended by Section 21-1501 and Section 21-501 of the D.C. Code, Supp. V (1966) are substantively the same as Section 21-501, D.C. (1961) Code, as amended and Section 21-351 of the D.C. (1961) Code, Supp. IV (1965).

Section 24-301(a), District of Columbia Code, 1961, as amended.

Rule 20 of this Court.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELLEN DONOHO MITCHELL,	:	
Appellant	:	
v.	:	Nos. 20916 20993
CYNTHIA D. ENSOR, ORIGINAL Petitioner	:	
R. K. KENNON JONES, Temporary Conservator	:	
FREDERICK K. BALLARD, Conservator:		
Appellees	:	

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is the second phase of this action, the first phase of which was adjudicated by this Court in its orders of June 10, 1966, and June 30, 1966 (Appeal No. 20, 198). Moot questions are therefore avoided. The jurisdiction of this Court lies under 28 U.S.C. Section 1291. And the jurisdiction of the court below, which was invoked pursuant to Section 21-501, District of Columbia Code, 1961, as amended, is questioned by the appellant. The legal validity of the Petition For Appointment of Temporary And Permanent Conservators (1st docket entry in the court below) is objected to.

STATEMENT OF THE CASE

On Dec. 20, 1965, a petition was filed in the U.S. District Court For The District of Columbia for the appointment of a temporary and permanent Conservator of the estate of the appellant by her sister, Mrs. Cynthia D. Ensor, a non-resident, residing at 10 Transverse Road, Garden City, Long Island, New York. (Appellant asks that the Court read the entire Petition contained in appellate record, 1st docket entry in the Court below). This petition was witnessed by two local Washington, D.C. attorneys), Paul L. O'Brien, and R. K. Kennon Jones, 888-17th St., N.W., Washington, D.C. 20006, who witnessed the petition as "Attorneys for Petitioner". The petitioner in the District Court, Mrs. Ensor represented that her petition was filed pursuant to Section 21-501, District of Columbia Code, 1961, as amended, and that the appellant, Mrs. Ellen D. Mitchell, was then in St. Elizabeths Hospital in the District of Columbia pursuant to Section 24-301(a), District of Columbia Code, 1961, as amended. The petitioner, Mrs. Ensor, further represented that she believed the appellant was unable, by reason of mental weakness or mental illness, properly to care for her property. In her petition Mrs. Ensor represented that the appellant had a Savings Account in Maryland with a current balance of $1,200.08. Mrs. Ensor further represented that the appellant owned certain personal property, the large part of it consisting of 124 - 1/2 shares, Strayer's Business College, Inc., Washington, D.C., but the appellate record throughout profusely shows that Strayer's or Strayers Business College, Inc., the parent corporation involved, is located in Baltimore, Maryland (tr. 28; Romig, and throughout the appellate record). There are other material and

obvious misrepresentations on the face of Mrs. Ensor's petition in view of appellant's mode of commitment, and she also asked that a guardian ad litem be appointed for the appellant.

The appellant was born in Baltimore, Maryland, August 15, 1925. At the time of the appointment of a temporary conservator of the estate of the appellant and conservator for the estate and person of the appellant, she was in St. Elizabeths Hospital under a criminal competency to stand trial commitment, stemming from a disorderly conduct charge. She was and is a resident and domiciliary of the State of Maryland. She came into the District of Columbia in May 1965, and spent the night at the Woodner Hotel where she was arrested for disorderly conduct on May 7, 1965. At the time of her arrest and confinement originally in D.C. General Hospital, the only property she had with her was "a suitcase containing clothing and personal effects and a pocketbook with Ninety ($90.00) Dollars in cash." (page 3 of Further Supplemental Report of Guardian Ad Litem And Request For Authorization For Payment To Psychiatric Consultant, filed March 17, 1966; in the appellate record). This Supplemental Report of Guardian Ad Litem indicated that there was also physically present in the District of Columbia at the time of the filing of the petition in December, 1965, a divident check payable to the order of the appellant in the amount of Seven Hundred and Forty-Five ($745.00) Dollars from Strayers Business College, Inc., Baltimore, Maryland, and jewelry (rings) in the possession of the police property clerk, the jewelry or rings having been taken from the appellant when she was arrested, and the dividend check apparently coming into the District of Columbia many months after her arrest through the efforts of the temporary conservator or other interested persons (tr. 38; Maher).

Counsel for appellant having orally suggested (tr. 7-8; Markwalter) that the District Court did not have jurisdiction of the cause of action or subject matter, or the person of the appellant, and counsel for appellant also having orally motioned the District Court (tr.9; Markwalter) to dismiss the petition for appointments because of its lack of jurisdiction of the cause of action or subject matter, or the person of the appellant, and the suggestion being disregarded and the motion overruled without prejudice, the Court proceeded with a hearing pertaining to a conservator and competency much against appellant's wishes and over her counsel's objections. A temporary conservator of her estate having already been arbitrarily appointed for the appellant without a hearing by the District Court, that court then proceeded to appoint a conservator of appellant's person and estate pursuant to that court's proceedings. The District Court ordered the cash resources and income from appellant's estate completely depleted for fees and approved the Auditor's Report, without one penny ever being spent on appellant's personal welfare and urgent needs even though the conservator was ultimately removed after a ruling by this Court and a remand of the case to the District Court and after appellant's most valued automobile was apparently stolen while it was in the custody of the conservator. It is the District Court's order entered on December 28, 1966 dividing the remaining $938.49, belonging to the appellant's estate, equally between the temporary conservator and the conservator for alleged services rendered, and the District Court's order entered on March 29, 1967 ratifying the Auditor's Report, from which appellant's two appeals are taken to this Court.

STATEMENT OF POINTS

I. The lower court erred in disregarding and overruling the many suggestions and oral motions questioning the Court's lawful jurisdiction to adjudicate with regard to the person or subject matter in this case, and the petition which initiated the action consequently should have been dismissed as void ab initio.

II. The lower court erred in assuming jurisdiction in this case based on a very factually erroneous petition which initiated the proceedings, and the petition consequently should have been dismissed on suggestion or oral motion as void from the beginning.

III. The lower court erred in assuming jurisdiction to adjudicate in this case because in doing so it failed to comply with the Federal Constitutional requirement of due process of law regarding the appellant's personal rights legally and Constitutionally.

IV. The lower court erred in disregarding the item of "costs" to the appellant including attorneys' fees to the appellant under the lawful and equitable powers of the federal courts, and improperly awarded numerous fees at the appellant's expense inasmuch as the lower court's orders in the entire case are null and void ab initio and should be reversed and vacated.

SUMMARY OF ARGUMENT

I. IT IS PLAIN REVERSIBLE ERROR FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA TO APPOINT TEMPORARY AND PERMANENT CONSERVATORS OF THE ESTATE OR PERSON OF APPELLANT WHO WAS COMMITTED IN PRE-TRIAL PROCEEDINGS TO A PUBLIC HOSPITAL AS NOT COMPETENT TO STAND TRIAL "BY ORDER OF THE COURT IN A CRIMINAL PROCEEDING."

The petition for appointment of conservators for appellant invokes statutory law for jurisdictional purposes which plainly does not apply to appellant, because Section 21-501, of the District of Columbia Code, 1961, as amended in Supp. V (1966) (Section 21-1501 and Section 21-501) states specifically that a ""mentally ill person" means a person who has a mental illness, but does not include a person committed to a private or public hospital in the District of Columbia by order of the court in a criminal proceeding." In substance, the foregoing is the same law that existed in Section 21-351, Supp. IV (1965), District of Columbia Code, 1961, and the civil action for the appointment of temporary and permanent conservators of the estate of the appellant began in 1965, whereas Section 21-1501 and 21-501, of the District of Columbia Code, 1961, Supp. V (1966), did not become effective until January 1, 1966, after a temporary conservator of Appellant's estate had already been illegally appointed in view of the criminal commitment. However, a conservator of Appellant's estate and person was subsequently appointed in 1966, while appellant was still in a criminal commitment status.

II. IT IS PLAIN REVERSIBLE ERROR FOR THE DISTRICT COURT TO APPOINT TEMPORARY AND PERMANENT CONSERVATORS OF THE ESTATE OR PERSON OF APPELLANT BASED ON A VERY FACTUALLY ERRONEOUS PETITION WHICH IS AND TENDS TO BE MISLEADING.

The petition for appointment of conservators for Appellant's estate erroneously alleged that the main portion of Appellant's personal property consisted of 124 - 1/2 shares, Strayer's Business College, Inc., Washington, D.C., whereas the appellate record and transcripts abundantly and profusely show that Strayer's or Strayers Business College, Inc., is located in Baltimore, Maryland. Other substantial errors of fact appear on the face of the petition for appointment of conservators which are obvious, in view of the appellant's mode of commitment.

III. IT IS PLAIN REVERSIBLE ERROR FOR THE DISTRICT COURT TO ASSUME JURISDICTION IN THIS CASE BECAUSE IT VIOLATES THE APPELLANT'S PERSONAL RIGHTS TO DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION.

In assuming jurisdiction in this case the District Court erred by bypassing the elaborate provisions of the District of Columbia Code for the civil commitment of persons alleged to be mentally ill, and proceeded to adjudicate as if the appellant had been civilly adjudicated mentally ill instead of only being committed to a public hospital as not being competent to stand trial "by order of the Court in a criminal proceeding." This Court in the case of Williams v. Overholser, 259 F.2d 175, 177 (D.C. Cir. 1958) unanimously declared:

> "The purpose of section 24-301(a), we think, is simply to prescribe the procedure for determining whether an accused person can understand the proceedings against him and properly assist in his defense, and to provide for his confinement in a hospital instead of a jail until he can."

IV. THE COURT BELOW ERRED LEGALLY AND POSSIBLY EQUITABLY IN TAXING THE APPELLANT WITH PRACTICALLY ALL "COSTS" FOR THIS INAUSPICIOUS LITIGATION, INCLUDING ATTORNEYS' FEES ON BOTH SIDES EVEN AFTER IMPORTANT AND SUBSTANTIAL MODIFICATION OF ORDERS BELOW BY THIS COURT.

The Appellant did not initiate the extensive and expensive litigation involved in this case and never consented to the lower court having jurisdiction at any time, whereas the Appellee Mrs. Ensor, and the two conservator appellees, and also the guardian ad litem have all apparently consented to the lower court assuming jurisdiction in the premises. Therefore, since it is submitted that the lower court was never a court of competent jurisdiction in the case it is further submitted that all orders in the case by the court below should be reversed and vacated and the appellant saved harmless financially as to all "costs" and property losses, and she should be restored to status quo in these respects at least as nearly as possible, in view of all the harm financially and otherwise that has been done by this inappropriate and destructive litigation.

ARGUMENT

I

IT IS PLAIN REVERSIBLE ERROR FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA TO APPOINT TEMPORARY AND PERMANENT CONSERVATORS OF THE ESTATE OR PERSON OF APPELLANT WHO WAS COMMITTED IN PRE-TRIAL PROCEEDINGS TO A PUBLIC HOSPITAL AS NOT COMPETENT TO STAND TRIAL "BY ORDER OF THE COURT IN A CRIMINAL PROCEEDING."

The jurisdiction of the District Court was originally invoked by Mrs. Cynthia D. Ensor pursuant to Section 21-501, District of Columbia Code, 1961, as amended, whereas the amendments to this Code Section make it very plain that the amendments as specified in Section 21-1501 and Section 21-501 of the D.C. (1961) Code, Supp. V (1966), apply only to those persons who have been civilly adjudicated to be "mentally ill persons." The substantive law that basically amended District of Columbia law relative to conservators was enacted by Congress in September 1964, and approved September 15, 1964. This amending law, Public Law 88-597, 88th Congress, S. 935, September 15, 1964, was called the "District of Columbia Hospitalization of the Mentally Ill Act." This bill by Congress has a long legislative history showing that the bill applies only to mentally ill persons in the District of Columbia committed by voluntary act or through civil commitment proceedings, and "does not apply to persons committed to a private or public hospital in the District by order of the court in a criminal proceeding. On pages 1 and 3 of U.S. House of Representatives Report No. 1833, 88th Congress, 2nd Session, dated August 20, 1964 (shortly before the bill was passed) the substance of the foregoing statement is clearly stated. On page 3 of this House Report No. 1833 it plainly states that "This bill applies only to mentally ill persons in the District of Columbia committed by

voluntary act or through Civil Commitment proceedings, and does not apply to persons committed to a private or public hospital in the District by order of the Court in a criminal proceeding." On page 1 of this same House Report it also clearly indicates that the bill does "not include a person committed to a private or public hospital in the District of Columbia by order of the Court in a criminal proceeding." Numerous Congressional Records and other Congressional Reports, and Committee Hearings show the same. These are too numerous to mention here. The rules of statutory construction require that all parts of an act are to be read and construed together to determine the legislative intent. And the legislative intent is actually the law. The law therefore appears to be plain so far as the intent of Congress is concerned with regard to Section 21-1501 and Section 21-501 of Supp. V (1966), which amended Section 21-501, District of Columbia Code (1961). No judicial decisions by this Court can be found on the amending sections as to the points in issue here. These amending sections from the 1964 "District of Columbia Hospitalization of the Mentally Ill Act" were merely brought forward from the 1961 Edition of the D.C. Code, Supp. IV, 1965, substantively speaking, for codification purposes, and renumbered. Accordingly, it was clearly error for the court below to assume jurisdiction in this case in disregard of all motions, and suggestions that it did not have jurisdiction of the appellant or the subject matter (or cause of action). Even process was illegally issued or abused as no substantive law warranted it in this case. (tr. 7-9; Markwalter) (also tr. 52, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 73, 78, 79, 80; by Romig). (also tr. 3, 15, 17, 20, 21, 22, 23, 29, 30, 31, 33, 34, 35, 38, 47, 49, 50, 51, 52, and 53; by Maher).

The Conservatorship law in question is purely statutory, although "The principles of equity exist independently of and anterior to all Congressional legislations, and the statutes are either annunciations of those principles or limitations upon their applications in particular cases." United States v. Detroit Timber and Lumber Co., 200 U.S. 321; 26S. Ct. 282. In a District of Columbia case, Henderson v. E. Street Theatre Corporation, D. C. Mun. Appeals 1949, 63A.2d 649, the Court ruled that "Jurisdiction of the subject matter may neither be assumed by a court nor conferred upon it by consent or silence, and objection thereto may be raised at any stage of the proceedings or upon appeal sua sponte." This apparently is standard federal and state law. Since the court below did not have jurisdiction of the cause of action and the appellant was not properly before that court the appellant, respectfully urges that the two orders appealed from, as well as all orders in the court below be reversed as nullities from the beginning and vacated. "A judgment of a court of limited or special jurisdiction will be deemed void on its face unless it affirmatively appears by sufficient evidence or proper averment in the record that the court had jurisdiction, there being no presumption of law in favor of jurisdiction of such a court." Galpin v. Page, 85 U.S. 350, 18 Wall. 350.

ARGUMENT

II.

IT IS PLAIN REVERSIBLE ERROR FOR THE DISTRICT COURT TO APPOINT TEMPORARY AND PERMANENT CONSERVATORS OF THE ESTATE OR PERSON OF APPELLANT BASED ON A FACTUALLY ERRONEOUS PETITION WHICH IS AND TENDS TO BE MISLEADING.

It is generally recognized that all fraud, whether legal, actual, or positive, vitiates everything it touches and it contaminates and renders void all transactions and proceedings so far as concerns the party against whom the fraud is committed. And in legal fraud where the act has a tendency to deceive or mislead others or to violate public or private confidence, such fraud is prohibited by law as a matter of policy.

As shown in the preceding Summary of Argument No. II, the erroneous representations made in the petition for appointment of conservators for Appellant's estate (1st docket entry in the court below) would seem to be so material that they amounted to at least legal fraudulent intent and possibly actual or positive fraudulent intent, thus and thereby voiding the petition for this reason alone. With respect to this point, appellant desires the court to read all of the pages of the reporters' transcripts mentioned in Argument I which pages specifically include oral motions to dismiss the petition (tr. 9; by Markwalter) and (tr. 51, 52 and 53 by Maher). In connection with the point herein, Federal Rule of Civil Procedure No. 8 (f) is respectfully cited which says that "All pleadings shall be so construed as to do substantial justice." Accordingly, appellant respectfully contends that the motions to dismiss the petition in the lower court should have been given more weight; all necessitating

reversal of all orders appealed from as well as all orders in the court below. On page tr. 9; by Reporter Markwalter, the appellant respectfully disagrees that the court below indicated or implied that a motion to dismiss the petition would have to be in writing. It has not been asked that the record here be corrected in the interest of time, however. As the Appellant recalls it, the court below only overruled the motion to dismiss the petition without prejudice and said only that the matter could be brought up again if it was desired. This matter of a motion to dismiss the petition was subsequently again made orally as indicated (tr. 51, 52, and 53, by Maher). In this connection it was held in Southern P. Co. v. Denton, 146 U.S. 202, 13 S. Ct. 44, that

> "Where the want of jurisdiction is apparent on the face of the petition, it may be taken advantage of by demurrer, and no plea in abatement is necessary."

ARGUMENT

III.

IT IS PLAIN REVERSIBLE ERROR FOR THE DISTRICT COURT TO ASSUME JURISDICTION IN THIS CASE BECAUSE IT VIOLATES THE APPELLANT'S PERSONAL RIGHTS TO DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION.

At this time the appellant can do little more than repeat her argument in Point III of the Summary of Argument to the effect that the lower court erred in assuming jurisdiction in this case because to do so violates her rights to due process of law pursuant to the Fifth Amendment of the Constitution of the United States. There was an unlawful abuse of process or the process was illegally issued. Accordingly, appellant submits that the assumption of jurisdiction below is invalid and all adverse orders in the case should be reversed and vacated. With regard to the facts and law of this case, the appellant is not a mentally ill person and the District Court did not have lawful jurisdiction of the person or the cause of action. In the case of Galpin v. Page, 85 U.S. 350, 18 Wall. 350, it is again urged that the Supreme Court held that

> "A judgment of a Court of limited or special jurisdiction will be deemed void on its face unless it affirmatively appears by sufficient evidence or proper averment in the record that the court had jurisdiction, there being no presumption of law in favor of jurisdiction of such a court."

With respect to this Point and the Appellant's entire brief, she desires the Court to read the entire "Motion For Additional Findings of Fact And Conclusions of Law or In The Alternative For A New Trial" which was filed in the court below on September 15, 1966, and which is in the appellate record; also the "Memorandum Relative To Points And Authorities Pertaining To Motion For Additional Findings of Fact And Conclusions of Law Or In The Alternative For A New Trial"

filed by appellant's husband and attorney in the District Court on October 4, 1966, in support of the foregoing "Motion" in the Court below.

ARGUMENT

IV.

THE COURT BELOW ERRED LEGALLY AND POSSIBLY EQUITABLY IN TAXING THE APPELANT WITH PRACTICALLY ALL "COSTS" FOR THIS INAUSPICIOUS LITIGATION, INCLUDING ATTORNEYS' FEES ON BOTH SIDES EVEN AFTER IMPORTANT AND SUBSTANTIAL MODIFICATION OF ORDERS BELOW BY THIS COURT.

Because of a time shortage appellant can do little more at this time than repeat her Argument in Point IV in the Summary of Argument, and respectfully submits that even Rule 20 of this Court justifies an award of all costs to Appellant if the court below did not have jurisdiction of the cause of action in the circumstances or of the person, as Appellant urgently contends. All of her property and expended monies should be returned to her it is respectfully contended, by reversing and vacating the two orders appealed from as well as all other adverse orders in the court below. In view of the equitable elements, if any are deemed annunciated in the Conservatorship Law invoked by appellees for jurisdictional purposes or otherwise, it is respectfully urged that this case could possibly be a case where the court below could award attorneys' fees to the appellant. Appellant does not contend that the District Court had to award attorneys' fees to appellant, however. To the contrary the District Court must exercise its discretion on equitable grounds and it is urged that this court decide if this is an appropriate case in which the District Court may exercise its discretion as to the award of attorneys' fees to the appellant, if equitable principles are considered to be involved in this case in any way, even in Code Section 21-501, as amended, pursuant to which the District Court

adjudicated in this suit, without jurisdiction, appellant respectfully contends. Therefore, appellant also respectfully submits that since the District Court has adjudicated plainly without jurisdiction the appellant should be awarded all of her costs, possibly including attorneys' fees, and she should be saved harmless financially and with regard to property losses, including a valuable and prized Packard automobile given to her by her father, which car was stolen while in the technical custody of the conservator. With respect to this point, appellant desires the Court to read her entire "Exceptions To The Report of Auditor" in the appellate record, these exceptions having been filed March 17, 1967 with the court below.

CONCLUSION

For any and all of the foregoing reasons, appellant prays that this Court reverse the two orders appealed from and all other adverse orders in this case from which she has received no benefits whatsoever, but to the contrary very great harm.

Respectfully submitted,

Ellen Donoho Mitchell, Appellant

By_____

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Attorney In Fact
(By General Power of
Attorney For This Case.)
also Counsel
For Appellant, If
Permitted by this
Court.

CERTIFICATE OF SERVICE

I, William G. Mitchell, hereby certify that a copy of the foregoing law brief, was mailed this 15th day of April, 1968 postage prepaid, to the following: Mrs. Cynthia D. Ensor, 10 Transverse Road, Garden City, Long Island, New York; Frederick A. Ballard, Esq., 912 American Security Bldg., Washington, D.C. 20005; R. K. Kennon Jones, Esq., Suite 808, 888 17th St., N.W., Washington, D.C. 20006; John L. Laskey, Esq., 1701 K St., N.W., Washington, D.C., 20006; Mary M. Burnett, Attorney at Law, 1001 Connecticut Avenue, N.W., Washington, D.C., 20006; and Hugh J. McGee, Esq., Suite 401, 401 Third St., N.W., Washington, D.C., 20001.

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BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20916 and 20993

ELLEN DONOHO MITCHELL, *Appellant*

v.

CYNTHIA D. ENSOR, R. K. KENNON JONES, and FREDERICK A. BALLARD, *Appellees*

Appeal from the United States District Court for the District of Columbia

---

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QUESTION PRESENTED

While the statement of four questions presented submitted by the Appellant is not inaccurate, the Appellee respectfully submits that there is only a single question presented, *i.e.*, whether the District Court properly assumed jurisdiction in the proceeding for the appointment of temporary and permanent conservators of the property of the Appellant, who, at the time the petition requesting said appointments was filed, had personal property within the District of Columbia and who was at that time committed to St. Elizabeth's Hospital by order of the Court of General Sessions in a criminal proceeding.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20916 and 20993

ELLEN DONOHO MITCHELL, *Appellant*

v.

CYNTHIA D. ENSOR, R. K. KENNON JONES, and FREDERICK A. BALLARD, *Appellees*

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On December 20, 1965, pursuant to D. C. Code § 21-501 (now D. C. Code § 21-1501), a petition was filed by the Appellee, Cynthia D. Ensor, in the United States District Court for the District of Columbia requesting the appointment of temporary and permanent conservators of the property of the Appellant, Ellen Donoho Mitchell.

At the time the petition was filed, the Appellant, a resident of Baltimore, Maryland, was in St. Elizabeth's Hospital in the District of Columbia for an indeterminate period, having been committed by the Court of General Sessions pursuant to D. C. Code § 24-301(a) as mentally incompetent either to understand pending criminal proceedings for disorderly conduct brought against her or properly to assist in her defense.

The Appellant had in the District of Columbia at the time of her arrest, and at the time the petition was filed, a dividend check for $745 from Strayer's Business College, Inc., a savings account book of the Maryland National Bank showing a balance of $1,200.08, $90 in cash, some jewelry and some clothing. The Appellee's petition also alleged that the Appellant owned 124½ shares of stock in Strayer's Business College, Inc.

The Appellant was notified of the pending proceedings, and a guardian ad litem, John L. Laskey, Esquire, and a temporary conservator, R. K. Kennon Jones, Esquire, were appointed by the Court. The Appellant was thereafter examined by a qualified psychiatrist, Dr. Zigmond M. Lebensohn, who testified at the hearing that she was unable to care for her property due to mental illness, which he described as schizophrenic reaction, chronic, undifferentiated type. (Tr. Romig, pp. 8-9). The District Court found that the Appellant was thus unable to care for her property and appointed Frederick A. Ballard, Esquire, as permanent conservator.

After the appointment of the permanent conservator by the District Court, the Appellant was released from St. Elizabeth's Hospital, she having been confined there for a period of time in excess of the maximum possible sentence carried by the charge of disorderly conduct against her. She thereafter moved this Court for summary reversal of the Order of appointment. In a *per curiam* opinion filed June 30, 1966, this Court held that the appointment of a

conservator of the Appellant's property was invalid to the extent that it was based on the 124½ shares of Strayer's stock. The case was then remanded to the District Court for a determination of whether jurisdiction was to be invoked on the basis of property of the Appellant within the District of Columbia.

On remand, the District Court, while making no specific finding as to the basis upon which jurisdiction existed, awarded compensation to the temporary and permanent conservators, thus indicating that jurisdiction has been assumed on the basis of property within the District of Columbia. Compensation had previously been awarded to the guardian ad litem. In view of the return of the Appellant to her residence in Baltimore, Maryland, the conservatorship in the District of Columbia was terminated by the Court as moot. Subsequently, the Auditor filed a report which was ratified by Order of the District Court.

It is the Order granting compensation to the conservators and the Order ratifying the report of the Auditor from which the appeals herein appear to be taken.

STATUTES AND RULES INVOLVED

UNITED STATES CONSTITUTION:

Fifth Amendment:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

DISTRICT OF COLUMBIA CODE:

§ 15-701. Compensation taxed as cost; attorneys' compensation from clients

(a) Except as otherwise provided by law, only the compensation specified in this chapter may be taxed and allowed to attorneys, proctors, United States attorney, clerk of the United States District Court for the District of Columbia, marshal, witnesses and jurors.

(b) This chapter does not prohibit attorneys and proctors from charging or receiving from their clients other than the government such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage or may be agreed upon.

§ 21-1502. Filing of petition; requirements; time and place of hearing; appointment of guardian ad litem

(a) Pursuant to the filing of the petition under section 21-1501, the court shall fix a time and place for a hearing; and shall cause at least 14 days' notice thereof to be given to the person for whom a conservator is sought to be appointed, if he is not the petitioner; and to such other persons as the court directs. The petition shall include, among other things—

(1) the reasons for the appointment of a conservator;

(2) the name and address of the person for whom the conservator is sought;

(3) the date and place of his birth, if known; and

(4) the names and addresses of the nearest known heirs at law, or the next of kin, if any.

(b) The court may appoint a disinterested person to act as guardian ad litem in a proceeding under this section. Upon a finding that the person for whom the conservator is sought is incapable of caring for his property, the court shall appoint a conservator who shall have the charge and management of the property of the person subject to the direction of the court.

§ 21-1503. Bond; powers and duties

The conservator before entering upon the discharge of his duties shall execute an undertaking with surety to be approved by the court in such amount as the court orders, conditioned on the faithful performance

of his duties as conservator. He shall have control of the estate, real and personal, of the person for whom he has been appointed conservator, with power to collect all debts due the person, and upon authority of the court to adjust and settle all accounts owing by him, and to sue and be sued in his representative capacity. He shall apply such part of the annual income and of the principal of the estate as the court authorizes to the support of the person and the maintenance and education of his family and children; and shall in all other respects perform the same duties and have the same rights and powers with respect to the property of the person as have guardians of the estates of infants.

§ 21-1505. Appointment of temporary conservator

Upon the filing of a petition as provided by this chapter, the court may, with or without notice or hearing, appoint a temporary conservator of the estate of a person, if it deems the action necessary for the protection of the estate, subject to the provisions for an undertaking specified by section 21-1503. The temporary conservator shall serve only until a permanent conservator can be appointed or until sooner discharged.

FEDERAL RULES OF CIVIL PROCEDURE:

RULE 54. JUDGMENTS; COSTS

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

SUMMARY OF ARGUMENT

Point I—The Appellant's contention that the District Court lacked jurisdiction in this case is completely without merit. All of the statutory requisites for the assumption of jurisdiction were present, *i.e.*, at the time the petition for the appointment of temporary and permanent conservators was filed, the Appellant was an adult person, and she had property in the District of Columbia. In fact, the existence of these elements is conceded by the Appellant in her brief.

Point II—The Appellant attempts to introduce an issue of fraud into this appeal by alleging that the Appellee's petition for the appointment of temporary and permanent conservators contained misrepresentations of fact. The Appellee not only disputes the allegation of misrepresentation, but also urges that the fact which the Appellant alleges was misrepresented is irrelevant to this appeal.

Point III—If the statute grants jurisdiction in this case and if the Court assumed jurisdiction on the basis of the facts as they appeared and the truth of which the Appellant has already conceded, obviously there has been no violation of the Appellant's constitutional right to due process of law.

Point IV—If the District Court had jurisdiction to entertain the conservatorship proceeding, it had the power to award compensation to the conservators. For the same reason, the Appellee should not be liable to pay the costs below, and in any event, the question of costs in the District Court is not properly before this Court. In addition, the Appellant may not recover attorneys' fees incurred in the court below. Finally, the Appellant has proceeded in this Court *in forma pauperis* by and through her husband; consequently she has incurred neither costs nor attorneys' fees and obviously thus cannot be reimbursed therefor.

ARGUMENT

I. THE DISTRICT COURT ACTED PROPERLY IN ASSUMING JURISDICTION OF THE CONSERVATORSHIP PROCEEDING INSTITUTED BY THE APPELLEE, CYNTHIA D. ENSOR

In connection with this point, the Appellee respectfully requests that the Court read pp. 6-17, 45 of the Transcript of Proceedings, March 1 and March 4, 1966, Reporter Romig.

Jurisdiction of the District Court was invoked under D.C. Code § 21-501 (now D.C. Code § 21-1501), which provides in essence that a proceeding for the appointment of a conservator of the property of an adult person may be initiated in the District of Columbia either:

1) Where the person for whom the conservatorship is sought resides in the District of Columbia; *or*

2) Where that person has property in the District of Columbia.

The Appellee has never made any contention that the Appellant was a resident of the District of Columbia at the time the conservatorship petition was filed, and this Court has already decided the question of whether the Appellant's stock ownership of Strayer's Business College, Inc. was property within the District of Columbia and hence a basis for the appointment of temporary and permanent conservators. It is clear, however, and the Appellant admits that she did have personal property in the District of Columbia at the time the petition was filed, consisting of cash on her person and a dividend check from Strayer's Business College, Inc. in the amount of $745, in addition to incidental tangible personal property. (Brief for Appellant, p. 3)

Two basic requirements for jurisdiction under § 21-1501 are thus not in dispute, *i.e.*, that Ellen Donoho Mitchell was an adult person at the time the petition for the appoint-

ment of conservators was filed, and that she had property in the District of Columbia at such time.

Before a conservator could be appointed, however, the District Court was required to make a determination that the Appellant was unable properly to take care of her property by reason of advanced age, mental weakness, mental illness, or physical incapacity. The Appellee's petition suggested to the District Court the possible existence of mental weakness or mental illness of the Appellant. Pursuant to D.C. Code § 21-1502 the Court set a time and place for a hearing, notified the Appellant, held a hearing, took competent expert testimony (Tr. Romig, pp. 6-17, 45), and found that the Appellant was incapable of caring for her property by reason of a mental illness.

In the face of this obvious compliance with the statute, the Appellant suggests that there is, nevertheless, an exception to the application of the conservatorship provisions where the person for whom the conservatorship is sought has been committed to a private or public hospital in the District of Columbia by order of the court in a criminal proceeding. In furtherance of this contention, the Appellant erroneously cites:

1) the definition of "mentally ill person" in D.C. Code § 21-501; and

2) language from the legislative history of the "District of Columbia Hospitalization of the Mentally Ill Act," Public Law 88-597, 88th Congress 2d Session (1964), in House Rep. No. 1833.

D.C. Code § 21-501 provides in part as follows: "*As used in the chapter:* 'mentally ill person' means a person who has a mental illness, but does not include a person committed to a private or public hospital in the District of Columbia by order of the court in a criminal proceeding." [Emphasis added.] It appears to be the Appellant's contention that this provision should operate to prevent the

institution of a proceeding for the appointment of a conservator of her property because she was in fact so committed. However, this definition of "mentally ill person" and all other definitions set forth in D.C. Code § 21-501 apply only to Chapter 5 of Title 21 (§§ 21-501—21-591) dealing with hospitalization of the mentally ill, and not to Chapter 15 of Title 21 (§§ 21-1501—21-1507) relating to conservatorships. In fact, the definitions in § 21-501 apply to no other chapter unless specifically incorporated into another section by reference, and the only such language which is incorporated into the chapter dealing with conservatorships is that defining "mental illness," not "mentally ill person."

The language cited by the Appellant from House Rep. No. 1833 of the "District of Columbia Hospitalization of the Mentally Ill Act" indicates that the Act did not apply in the case where a person had been committed to a private or public hospital in the District of Columbia by order of the court in a criminal proceeding. The Appellant justifies the use of this language and attempts to establish its relevancy by erroneously stating that the aforementioned act "basically amended District of Columbia law relative to conservators." (Brief for Appellant, p. 9) This is simply not the case at all. In fact, the only portion of that Act which even remotely pertains to conservatorships is Section 18 which added an additional incapacity justifying the appointment of a conservator, *i.e.*, "mental illness (as such term is defined in the District of Columbia Hospitalization of the Mentally Ill Act)." This provision was codified in D.C. Code § 21-1501, which refers back to § 21-501 for the definition: " 'mental illness' means psychosis or other disease which substantially impairs the mental health of the person." Otherwise, that Act has no bearing on conservatorship proceedings.

Appellee understands that the purpose of the D.C. Code § 21-501 definition of "mentally ill person" quoted above

is to prevent institution of proceedings for civil commitment while a person is hospitalized pursuant to a court order in a criminal proceeding. It has no bearing on conservatorship actions, which may be instituted with or without civil commitment proceedings.

At the original hearing, Dr. Zigmond M. Lebensohn testified concerning the Appellant's mental condition as follows (Tr. Romig, p. 9):

> "As I stated earlier, she is now suffering from and has been suffering from a psychiatric disorder which is diagnosed as schizophrenic reaction, chronic, undifferentiated type. This disorder is manifested chiefly by looseness of associations, childish behavior, lack of impulse control, some flightiness in speech . . . lack of mature judgment, vulnerability to the influence of alcohol, a tendency to be undisciplined in her habits, and a tendency to be unduly influenced by others."

Certainly this testimony indicates the presence of a mental illness as that term is defined in D.C. Code § 21-501. In addition, the doctor stated (Tr. Romig, p. 8) that it was his considered opinion that because of this psychiatric disorder the Appellant was not capable of exercising the mature judgment necessary to manage her substantial financial affairs and her property. Dr. Lebensohn also testified in great detail (Tr. Romig, pp. 9-17) as to his observations of the Appellant upon which he based his opinion. This testimony was corroborated by Dr. Elizabeth R. Strawinski, a psychiatrist and clinical director at St. Elizabeth's Hospital, who testified that the Appellant was mentally incapable of exercising sound business judgment. (Tr. Romig, p. 45).

In the Order of the District Court filed March 17, 1966, appointing the permanent conservator, Judge Gasch determined that the Appellant's mental condition was such that she was not capable of handling her property and business affairs, and the Court specifically found that the Appellant's condition was as described by the consultant

physician, Dr. Lebensohn, and the patient's attending psychiatrist at St. Elizabeth's Hospital. It is readily apparent from this examination of the hearing in the District Court that all of the statutory requirements relating to jurisdiction and findings necessary for the appointment of a conservator were met.

On the basis of the above, the Appellee submits that the statutory provisions for the appointment of conservators in the District of Columbia are completely clear and unambiguous, and were complied with by the District Court. The Code provision (§ 21-1501) clearly enumerates the factors which the District Court must take into consideration in passing upon such a petition. Thus, there having been property of the Appellant, an adult person, in the District of Columbia, the District Court unquestionably had jurisdiction to receive and pass upon the Appellee's petition for the appointment of conservators of the Appellant's property. The rules of statutory construction dictate that where the language of a statute is clear and unambiguous on its face, there is no need or justification for going any further. But even assuming, arguendo, that the applicable statutory provision is ambiguous, the legislative history which the Appellant cites is clearly inapplicable to the provisions relative to conservatorships, because the "District of Columbia Hospitalization of the Mentally Ill Act" did not, as the Appellant contends, basically amend District of Columbia law relative to conservators.

II. THE APPELLEE'S PETITION FOR THE APPOINTMENT OF TEMPORARY AND PERMANENT CONSERVATORS CONTAINS NO MISREPRESENTATION OF MATERIAL FACT

It is respectfully contended that the Appellant's allegations of fraud are specious. In fact, the only alleged misrepresentation asserted by the Appellant is that the Appellee's petition erroneously represented that Strayer's Business College, Inc. was in Washington, D. C., rather than in Baltimore, Maryland. Admittedly, Strayer's

Business College, Inc., is a Maryland corporation, but it should be pointed out that the Appellee's petition did not presume to set forth the state of incorporation of the school. Furthermore, it is entirely accurate to place the words "Washington, D. C." after Strayer's Business College, Inc., because it operates a business college in the District of Columbia through its subsidiary, Strayer Junior College, Inc., which is a District of Columbia corporation.

In any event, this question of alleged factual misrepresentation is not germane to this appeal. In the previous opinion of this Court, it was held that the stock of Strayer's Business College, Inc., which was owned by the Appellant, could not be the basis of the conservatorship proceeding, because the school was incorporated in Maryland and the stock certificate was outside the jurisdiction. This Court then remanded the case for a determination of whether conservatorship jurisdiction was to be invoked on the basis of the presence of the Appellant's property found within the District of Columbia. It is this question which is now before the Court, and quite obviously, then, the location of Strayer's Business College, Inc. is irrelevant.

III. ASSUMPTION OF JURISDICTION WAS NOT VIOLATIVE OF THE APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION

In connection with this point, the Appellee respectfully requests that the Court read pp. 6-17, 45 of the Transcript of Proceedings, March 1 and March 4, 1966, Reporter Romig.

In support of the Appellee's argument directed to the Fifth Amendment due process question raised by the Appellant, reliance is placed primarily upon Argument I, *supra,* which establishes the existence of clear statutory authority for the assumption of jurisdiction in this case. The statute (D.C. Code § 21-1501) is plain and unambiguous; the statutory bases of jurisdiction were present, a fact which is apparent on the face of the record

and conceded by the Appellant; and the Court acted on the Appellee's petition in complete conformity with the prescribed statutory procedure set forth in D.C. Code §§ 21-1501 and 1502. Quite clearly, if jurisdiction is granted by statute and properly assumed by the Court, no constitutional question is presented, unless it is the Appellant's contention that if in so granting this jurisdiction, Congress exceeded its constitutional authority. Not only would this be a highly untenable position, but it also does not seem to have been raised by the Appellant.

Furthermore, the actual conservatorship proceeding was conducted in complete conformity with the Appellant's rights to due process of law and fundamental fairness under the Fifth Amendment. She was notified of the action within the required time set forth in D.C. Code § 21-1502(a); a guardian ad litem was appointed pursuant to D.C. Code § 21-1502(b) to safeguard her interests; a temporary conservator was appointed pursuant to D.C. Code § 21-1505; she was represented by competent counsel at all stages of the proceeding; and prior to any appearance in Court, she was examined by highly qualified psychiatrists. Furthermore, the Appellant was granted a full evidentiary hearing under D.C. Code § 21-1502 at which the psychiatrists gave testimony (Tr. Romig, pp. 6-17, 45) and at which she was afforded an opportunity to cross-examine witnesses and to present any evidence she saw fit.

It was only after thus insuring the protection of the Appellant's rights and proceeding carefully in accordance with the terms of the statute, that the Court made its determination that the Appellant was unable to care for her property due to mental illness. (Order of the District Court filed March 17, 1966, Gasch, J.)

IV. JURISDICTION HAVING BEEN PROPERLY ASSUMED BY THE DISTRICT COURT, COMPENSATION WAS PROPERLY AWARDED TO THE CONSERVATORS, AND THE APPELLEE IS NOT LIABLE TO REIMBURSE THE APPELLANT FOR COSTS OR ATTORNEYS' FEES IN THIS COURT OR IN THE COURT BELOW OR FOR THE VALUE OF THE APPELLANT'S STOLEN AUTOMOBILE

The Appellant's Argument IV seems to be directed to four specific points:

(a) that the District Court erroneously awarded compensation to the temporary and permanent conservators;

(b) that the District Court erroneously assessed the Appellant for all costs and attorneys' fees arising out of the conservatorship proceeding;

(c) that, in any event, the Appellant is entitled to all costs and attorneys' fees in this Court and in the Court below; and

(d) that the Appellant is entitled to reimbursement for a car allegedly stolen while in the "technical custody" of the permanent conservator.

A. Compensation of Conservators

The Appellant's argument for reversal of the Order awarding compensation to the temporary and permanent conservators and for an award of costs and attorneys' fees is based entirely on her contention that the District Court lacked jurisdiction in this case. Relying on Argument I, *supra,* the Appellee submits it is indisputable that the District Court had and properly assumed jurisdiction. Having jurisdiction over the proceedings, that Court thus had the power to award compensation to the fiduciaries who discharged their duties under D.C. Code §§ 21-1503 and 1505 and who performed valuable services from which the Appellant derived obvious benefit. In re *Searle*, 118 F. Supp. 273 (1953).

B. Alleged Award of Costs and Attorneys' Fees Below

Contrary to the contention of the Appellant, the District Court made no award of costs and attorneys' fees below. Even if such an award had been made, however, a reversal would not be warranted, except upon a showing of abuse of discretion by the District Court. Rule 54(d) of the Federal Rules of Civil Procedure provides as follows:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party *unless the Court otherwise directs; . . .*" [Emphasis supplied]

This Court has held that, absent the operation of a statute of the United States or of the Federal Rules of Civil Procedure, the District Court has discretion in assessing or not assessing costs, and its decision will not be reversed unless there has been an abuse of that discretion. *Association of Western Railways* v. *Riss & Company, Inc.*, 320 F. 2d 785, 116 U.S. App. D.C. 63 (1963).

Review of a question of costs can be had by this Court only if the power of the District Court in awarding or not awarding costs is questioned. *Association of Western Railways* v. *Riss & Company, Inc.*, 320 F. 2d 785, 790, 116 U.S. App. D.C. 63, 68 (1963). The Supreme Court has stated: "There is no doubt that, as a general rule, an appeal does not lie from a decree solely for costs . . ." *Newton* v. *Consolidated Gas Co.*, 265 U.S. 78, 82 (1924). This Court not only adopted that language, but also added the following: "This may be equally true as to a decree which declines to award costs." *Association of Western Railways* v. *Riss*, 320 F. 2d 785, 790, 116 U.S. App. D.C. 63, 68 (1963).

The question of attorneys' fees in the District Court is similarly not before this Court, and it should also be pointed out that "attorneys' fees may not be taxed to either

party unless provided for either by law or by agreement between the parties." *Moses-Ecco Company* v. *Roscoe-Ajax Corporation,* 320 F. 2d 685, 690, 115 U.S. App. D.C. 366, 371 (1963); D.C. Code § 15-701 (1967); see, *Rosden* v. *Leuthold,* 274 F. 2d 747, 107 U.S. App. D.C. 89 (1960). Neither the Federal Rules of Civil Procedure, the local rules of the District Court, nor the District of Columbia Code provides for the awarding of attorneys' fees to the "prevailing party" in a conservatorship proceeding.

C. Appellant's Demand for Costs and Attorneys' Fees

Because there was proper jurisdiction below (see Appellee's Argument I, *supra*), the Appellant should not be entitled as a matter of law to costs in the District Court. In addition, if the District Court did not see fit to award costs to the Appellant below, this Court cannot direct otherwise unless there has been an abuse of discretion by the District Court in not awarding costs. In support of this argument, the Appellee relies on the argument made and the cases cited in Argument IV. B., *supra,* and respectfully refers the Court to those materials.

Furthermore, regardless of the disposition of this case on appeal, the Appellant may not recover costs under Rule 20 of this Court, because she has not incurred any costs whatsoever. She was granted leave to appeal *in forma pauperis* by Order of this Court filed June 19, 1967, and pursuant to that permission she has proceeded on appeal under Rule 41 of the General Rules of this Court and has submitted her brief in conformity with the provisions of Rules 17 and 41(j) of the General Rules of this Court. With regard to attorneys' fees on appeal, not only does the Appellee make reference to the established law set forth earlier in this argument that such fees are not recoverable, but it is also relevant to point out that the Appellant has not incurred any attorneys' fees, she having been represented at all stages of the case on appeal by her husband.

D. The Stolen Automobile

Finally, despite the Appellant's vague assertion that her "valuable and prized Packard automobile . . . was stolen while in the technical custody of the conservator," the Appellee informs the Court that this car was never, in fact, in the custody of the conservator, and was never located by him. In any event, even if the conservator had obtained custody of the automobile, liability could not be imposed on the Appellee, Ensor, on this appeal, in an independent civil action, or otherwise. The Appellant's proper remedy, if any, would be to proceed independently against the conservator or on his bond.

CONCLUSION

For the foregoing reasons, the Appellee, Cynthia D. Ensor, respectfully prays that the orders of the District Court appealed from be affirmed.

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